

60515

30

REMARKS

ON THE

INCONSISTENCY

OF THE

TABLE OF DESCENTS,

PROJECTED BY

Mr. PROFESSOR CHRISTIAN,

In the TWELFTH EDITION of the COMMENTARIES,

WITH THE

DOCTRINE laid down by Sir WILLIAM BLACKSTONE,

and by every WRITER on the LAW OF DESCENT.

BY THE

AUTHOR OF REMARKS ON THE LAWS OF DESCENT.

(William Osgoode.)

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH, FLEET-STREET.

1797.

7x
B631x

JUL 3 1908

REMARKS, &c.

SOME few months before the decease of Mr. Justice *Blackstone*, a pamphlet was published, intitled "Remarks on the Laws of Descent, and on the Reasons assigned by Mr. Justice *Blackstone*, for rejecting, in his Table of Descent, a Point of Doctrine laid down in *Plowden*, Lord *Bacon*, and *Hale*." By the subsequent editions of the Commentaries it appears that the same point of doctrine is still rejected, though some slight alterations are made in the reasons assigned for such rejection. On the other hand, although the *Remarks* on those *Reasons* were made by a student, yet the experience of twenty years, which have elapsed since the *Remarks* were written, instead of reconciling his notions to this juridical heresy, has served to confirm his opinion of the validity of the doctrine set forth by the primitive writers.

By an elaborate note subjoined to the chapter on Descents, by the Editor of the twelfth edition of the Commentaries, the Reader is informed, "That from the consideration he has bestowed on the subject, he entirely concurs with the learned Judge" (whom I shall hereafter cite without addition by the truly respectable name of *Blackstone*) in giving the preference to the representatives of the grandfather's mother or *besayles*, designated in the Table of Descents by N^o 10, before the representatives of the *ayles* or father's mother, designated by N^o 11; and he has stated to the public the principal ground which he relies upon in maintenance of the point advanced in the Commentaries.

It has happened, that "the Twelfth Edition of the Commentaries, with the last Corrections of the Author, and with Notes and Additions by *Edward Christian* Esq. Barrister at Law, and Professor of the Laws of *England* in the University of *Cambridge*," though published in the year 1794, did not fall into the hands of the writer of the Remarks before mentioned till the year 1797. On perusing the note annexed to the chapter on Descent, which note contains a new scheme of descent, purporting to be an explanation of the plan laid down by *Blackstone*, it appeared that the scheme and explanation therein contained was not only inconsistent with the doctrine laid down in the Commentaries, but also with the doctrine of every writer of authority who has treated on the Law of Descent. Had the writer met with this edition on its first publication, he might probably have been induced to make these remarks at an earlier period.

At present it is proposed to remark on the only material alteration made in the *reasons* as they now stand, from the form in which they were presented to the public in the sixth edition of the Commentaries, and then to consider the principal grounds relied upon by the Editor in support of *Blackstone's* preference abovementioned.

THE fourth reason for rejecting, &c. as it stood heretofore, was stated thus: "Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the Table." The Remarks having objected to general charges, in the corrected edition, the following clause is added, "wherein N° 16, which is analogous in the maternal line to N° 10 in the paternal, is preferred to N° 18, which is analogous to N° 11, upon the authority of the eighth rule laid down by *Hale* himself." Now I take the freedom to question the accuracy of this analogy, and to assert, that it is incorrect in every particular by which a fair analogy can be constituted; as well with regard to the quality and name of the parties, as to their respective positions on the Table; and for the determination of the issue between us, am content to refer to the evidence of inspection.

FIRST,

FIRST, there is no analogy in the quality of the parties, for N° 16 represents a *male* stock of the maternal line, and N° 10 a *female* branch of the male stock of the paternal line.

HENCE it follows secondly of necessity, that there is no analogy in the names of the parties; the male stock of the maternal line must bear the name of *Baker* invariably, whereas the female branches of the male stock of either line bear various names, as *Kempe*, *Smith*, or *Godfrey*; the correct analogy with the uniform name of *Baker*, the male stock in the maternal line, is with the uniform name of *Stiles*, the male stock of the paternal line: there can therefore be no correct analogy between the name of *Baker* and the name of *Smith*.

THIRDLY, with respect to their position in the Table, it manifestly appears that N° 16 is absolutely to the left of the maternal line, but N° 10 is not absolutely to the left of the paternal line, that position being occupied by N° 9. It is obvious, that if the scheme of the paternal line were lifted and placed upon the maternal line, after the course of demonstration adopted in the elements of geometry, the coincidence of N° 10 would be with N° 17 and not with N° 16; there is therefore no correct analogy between N° 10 and N° 16.

THE analogy between N° 11 and N° 18 is admitted; but the inference deduced therefrom is not admitted, for reasons that shall be assigned hereafter.

THE *remarks* on the *sixth reason*, adduced by *Blackstone*, made a direct appeal to his candour for having imputed doctrines to *Plowden* and *Hale* contrary to their professed sentiments.—In justice to the author of the Commentaries it is to be observed, that he has withdrawn the charge, and given a new turn to the sixth reason in the corrected edition.

PERHAPS it may appear too minute, to repeat an observation made on an unfair statement in the seventh reason, which, though liable to the detection of every reader, has not been corrected—namely, that a fallacy is involved by stating that “the blood of the *Stiles* does certainly not fail till both N° 9 and N° 10 are extinct; “wherefore N° 11, being of the blood of the *Kempes*, ought not “to inherit till then;” whereas it will appear, by turning to the Table, that No. 10, though coupled with N° 9, as if it were a male stock, represents a female branch of the blood of the *Smiths*, and is of the same class with N° 11.

WITH respect to the 8th reason, the writer is no longer restrained by that diffidence which was becoming a student, from declaring that he continues to think, as he then thought, that it is a most discreditable piece of sophistry.

WITH regard to the Editor's note, it is proposed to transcribe it at length, for two reasons.—First, That the casual reader may be completely in possession of the Editor's scheme, without the trouble of a reference to the original; and secondly, by stating the context with the parts cited, to obviate the suspicion of a want of candour, to which a comment on detached periods is always liable.

AFTER passing a civility on the supposed Author of the Remarks, and observing that the late learned *Vinerian* Professor has also declared that he can by no means accede to this opinion of Sir *William Blackstone*, 2 *Wodd.* 262. he goes on, “But from the consideration which I have bestowed upon the subject, I entirely concur “with the learned Judge in giving a preference to N° 10 before “N° 11. I am ready to admit that some of the reasons adduced “to maintain this doctrine cannot be supported; but it does not “follow, that a doctrine is erroneous, because, out of a number of “arguments in its favour, some of them are not unanswerable. “But the principal grounds which the editor relies upon are the following, *viz.* That the rule laid down by the learned Judge is
“ part

“ part of a consistent and certain system, by which we can immediately discover the heir to any inheritance ; if we deviate from it, we are soon bewildered amidst uncertainty, inconsistency, and confusion ; and when the law of descents is not called in to make a provision for a man’s family, and his near relations, in which both our reason and feelings, however we may wish to divide the inheritance into different portions, correspond with the law, it is then entirely *juris positivi*, and its only object is certainty, by which anxiety and litigation among a number of claimants of an intestate’s estate may be suppressed. But the law of descents is established beyond all possibility of controversy, till we search for an heir among great uncles and second and third cousins. And between these, and still more remote relations, it is of infinitely greater concern to the public to fix a rule, which can instantly inform us who is the heir, than to attend to any petty considerations of propriety, who ought to be the heir. It is fully settled in the case of *Clere and Brooke*, *Plowd.* 450., that the brother of a grandmother or his representative, shall be preferred in the descent of a newly-purchased estate, to a brother of a mother or his representative ; and this is a law, which is certainly contrary to our natural wishes and sentiments ; but it does little violence to our feelings, to postpone the brother of a grandmother to the brother of a great grandmother ; and so in succession. If the grandmother is more worthy than the mother, because related by one male blood, and the mother by none, the great grandmother, as is well observed by the editor of *Plowden*, ought to be still more worthy, being related by two male bloods. Whatever may be the principle which operates so powerfully as to carry the estate past the mother to the grandmother, ought to preserve its consistency, and to carry it also from the grandmother to the great grandmother ; but certainty is of much greater importance than consistency or symmetry ; and if we have no other rule among heirs through females beyond the mother, than proximity, what have we to assist and guide us when there are descendants of a number of female ancestors, or of ancestors through females

“ females of equal proximity? For if N^o 10 is not to be pre-
 “ ferred to 11, what principle can we find to determine between
 “ 10, 12, and 13? They have all an equal claim by proximity.
 “ The supporters of proximity will not be so bold as to say that
 “ they shall be coparceners, or that they shall run a race, and one
 “ shall gain the estate by occupancy. If we go a step higher we
 “ shall find the descendants of the brothers of *Ann Godfrey, William*
 “ *Smith, Jane King, Thomas Kempe, Sarah Browne, Charles Holland,*
 “ and *Mary Wilson* have all the same pretensions; and we may
 “ easily suppose also 15, 31, or any other number of claimants,
 “ without any clue whatever to determine the priority of their
 “ proximity. But according to the rule laid down by the learned
 “ Judge, no two cases can possibly be produced, but we can de-
 “ termine instantly which has the prior right by descent. More-
 “ over, a *feudum novum* is considered as a *feudum antiquum*, or a feud
 “ of indefinite antiquity; and if it had actually descended, which
 “ we may suppose, from *Walter* or *George Stiles*, then the heirs by
 “ their wives and the wives of their descendants would all have been
 “ entirely cut off; and therefore it is not unreasonable or, at least, in-
 “ consistent with that supposition, that an heir on the part of a wife
 “ of a more remote ancestor of the *Stiles's* should be preferred to
 “ the heir on the part of a wife of a nearer ancestor.

“ If then the plan of descents laid down by the learned Judge be
 “ established, it may be explained by the scheme subjoined, which
 “ will determine the heir at law in all cases that can possibly be put
 “ or devised. In tracing the heir downwards in the descending
 “ line, no difficulty can ever occur. But in the scheme annexed, I
 “ suppose the *propositus* to die without issue, and without brothers or
 “ sisters seized of an estate by purchase; and I suppose A, B, C, D, &c.
 “ to Z, to be his father, grandfather, &c. his lineal ancestors of the
 “ same name, and a, b, c, d—z, to be their wives respectively, who are
 “ not necessarily related to each other. To find then the heir of the
 “ *propositus*, we must inquire for the lineal heir, or the representative
 “ of the eldest brother of A the father; then for the representative
 “ of

" of the second, third, &c. ; but if A had no brothers, then for his
 " sisters and their representatives ; if none can be found, we must in
 " like manner have recourse to B, and so on to C, and if we find a
 " representative of III, the eldest brother of C, he is the heir at
 " law to the intestate, and will inherit before the representatives of
 " the brothers of D, E, F, &c. : and thus we are to go back through
 " the lineal male ancestors of the intestate ; but if in going up to Z,
 " or any indefinite distance, we can find no heir issuing from the
 " male ancestors, we must then have recourse to the females ; *but in*
 " *this research we must begin at the other end, and pursue a different*
 " *direction.* We must inquire, first, Whether z, the wife of one of
 " the remotest male ancestors of the *propositus*, had a brother or
 " sister leaving a representative ; for if so, he will be the heir of the
 " *propositus* ; if we suppose 24, 6, 3, to be the respective brothers of
 " the wives, then the descendants of 24 will inherit before those of
 " 6 ; and for the same reason those of 6, before those of 3. If z
 " had no brother or sister leaving issue, but as collateral relations
 " descended from her ancestor, one of those must be preferred to
 " any heir on the part of f, e, d, &c. ; and to discover such an heir of
 " z, we must put z in the place of the *propositus*, and inquire for the
 " representative of the brothers and sisters of her male ancestors, and
 " then of their wives as before, and such an heir of z will inherit
 " before the heir of d, c, b, and a ; and for the same reason their heirs
 " respectively will have a preference as we come down to a. This
 " Table the Editor conceives is not difficult to be comprehended, and
 " will determine immediately the priority of relations ever so re-
 " mote, if their pedigrees can be traced.

" It must be remembered that if it is known that the estate has
 " descended from E to the *propositus*, then none of the heirs of
 " e, d, c, b, a, can ever be admitted ; and if it has descended from one of
 " the wives, *viz.* f, then as before the heirs of e, d, c, b, a, are excluded,
 " and also the collaterals of the male ancestors above E ; and if no
 " collateral of E, D, &c. f's descendants can be found, then to find
 " her heir, she must be put in the place of the *propositus* in the Table.

“ The student must also observe, that if an estate, of which the *pro-*
 “ *positus* is the purchasor, should descend to a representative of a
 “ brother of C, from the *propositus*, upon failure of that branch, it
 “ may afterwards pass to a representative of a brother of F, and so
 “ upwards in the male line; but being once in the line of VI, the
 “ female branches f, e, d, &c. are cut off; for they are not related by
 “ blood to F; but, upon failure of that line, it is still transmissible to
 “ the lines of the females above; for their collaterals would be re-
 “ lated by blood, or will have a common ancestor with F; and this
 “ is another strong argument in support of the doctrine *that the re-*
 “ *moter females should be preferred to the nearer*; for this may be pre-
 “ sumed to have been the progress of the estate in its descent from
 “ the *propositus*. When also it passes from the male into any fe-
 “ male line, it cannot afterwards pass into any other female line, for
 “ they are not related to each other by blood. See N^o 9. p. 220.”

TABLE OF DESCENTS.

Brothers or Sisters	Male Line	Their Wives	Brothers or Sisters
	Z	z	24
	.	.	
	.	.	
	.	.	
	.	.	
VI.	F	f	6
	E	e	
	D	d	
III.	C	c	3
	B	b	
	A	a	
	Propositus and First Purchasor.		

HAVING

HAVING stated the Editor's scheme of Descents, together with its explanation at length, we now proceed with our remarks on this copious note. In discussions of this nature, more especially when they may in some sort be said to be delivered *ex cathedra*, no one will deny that a certain degree of accuracy is requisite; I trust, therefore, it will not be imputed to a spirit of cavil, if it is observed, that the very first allegation is founded on a mistake, and consists of what, in the discourteous language of the profession, is termed a false fact. It is stated, "that the *Rule* laid down by the learned "Judge," &c. Now, I believe, it will be a difficult task to shew, that the learned Judge has laid down any *Rule* respecting the point in question.—A Rule is usually understood to be a general proposition, to guide the judgment without referring to any particular instance; of these general propositions he has given seven, termed Rules or Canons of Descent, and these he has fully illustrated: but after a frequent perusal of the Chapter, instead of finding a formal Rule to justify the doctrine in question, we could not discover a single sentence in support of the anomaly, till it is abruptly laid down in the explanation of the Table of Descents, p. 237. The writer well remembers how much he was perplexed, in the first instance, by the subtle texture of *Blackstone's* 8th Reason; and that not being able for some time to unravel it to his satisfaction, he sought with great eagerness for some rule or general principle, in which the doctrine might be avowed in the abstract, that he might grapple with it directly, being convinced from other sources that any rule calculated to justify such preference must be unfounded: but, to his great regret, in that research he was disappointed. The doctrine turns therefore upon an inference drawn from a special instance in the Table of Descent, where a preference is given to the more remote of two collateral ancestors of equal dignity; and though it is allowed, that in adducing the reasons for having "*ventured to give this preference,*" *Blackstone* takes as extensive ground as if he were contending for a principle; yet it is no where laid down, that we can discover, as a

rule to guide us in the collateral ascending line*; and if it were laid down in the Text, it is disregarded in the Table; otherwise a preference must be given to the representatives of *Anne Godfrey*, instead of the representatives of *Christian Smith*.

ONE would wish to avoid the anticipating this imputed rule, till we come to that part of the note where it is positively avowed, and plainly expressed by the Editor; but unless it be laid before the Reader, he will not be able to judge of the validity of the allegation, "That if we deviate from it, we are soon bewildered amidst uncertainty, inconsistency, and confusion." The Rule therefore laid down by the Editor is this, "That if in going up to Z, or to any indefinite distance, we can find no heir issuing from the male ancestors; we must then have recourse to the females, but in this research *we must begin at the other end*, and pursue a different direction."

AFTER the fatal consequences thus denounced, it will certainly astonish the Reader to hear, that the doctrine in this case, delivered by every writer of authority from the days of *Bracton*, till the publication of this twelfth Edition of *Blackstone*, does deviate from the Rule laid down by the Editor, as far as *the next* can be supposed to deviate from the most remote. With regard to the evil of uncertainty, it is submitted to the Reader's judgment, whether uncertainty is more likely to ensue, from directing our inquiries

* It cannot escape the observation of any one conversant with this title of jurisprudence, that the Commentaries are particularly defective when they treat of collateral successions in the ascending line; and that the attention given to this part of the subject is nowise proportionate to the pains he has bestowed on other parts, which needed less explanation. Sir *Matthew Hale*, having treated on the descending line, observes, "That in successions in the line ascending there must be a fuller explication, because it is more obscure. I shall therefore set forth the whole method of Transversal Ascending Descents, under the eight ensuing Rules." How it happened that the Author of the Commentaries, who in general has given a graceful polish to the rough, but solid materials collected by ancient writers, has in this particular been negligent, is not easy to determine, unless because he found that these materials could not be adapted to the symmetry of part of his Table.

to the second or third generation ascending, or to the twenty-fourth? Instead of expecting certainty to result from this method of investigation, it seems rather calculated to preclude the very notion of it: for if we fix on an ancestor at twenty generations distance, we cannot conclude with certainty that the representative of such ancestor shall inherit, because, by possibility, there may exist some one more remote, who ought to inherit; whereas, by the system heretofore established, whenever the inheritance vests in a near ancestor, all the remote are necessarily excluded. To the same tribunal is submitted the decision of this most difficult question;—it being admitted on all hands, that in searching for representatives through the male ancestors, the system is to begin with the next, and proceed to the more remote;—Whether, in tracing through the female ancestors, it be more or less consistent with such system to begin with the most remote instead of the next? And likewise of this question: Is confusion more likely to arise from uniformity, or from a breach of uniformity? Surely the import of these terms should have been considered, before they were thus liberally bestowed.

THE Editor proceeds—"When the law of Descents is not called in, &c.—reason and feelings—petty considerations of propriety—"natural wishes and sentiments," &c. &c. Being thus prohibited from offering a word in behalf of the petty considerations of propriety or consistency, as connected with a branch of science, said to be founded on principles constant, uniform, and universal; we feel little inclination to take a journey in the unknown regions of natural wishes, feelings, and sentiments. We shall leave the offended qualities of propriety and consistency to assert their own importance, and attend to the course of the Editor's argument. "It is fully settled in the case of *Clere v. Brooke*, *Plowd.* 450. that the brother of "a grandmother*, or his representative, shall be preferred in the

* This is not put with sufficient precision, for the term grandmother being equivocal, the position may be denied, or misunderstood.—Thus for instance, it was not determined, nor is it law, that the brother of a grandmother, *i. e.* the mother's mother, shall be preferred, &c. &c.; although it was determined, and it is law, that the brother of the grandmother, *i. e.* the father's mother, shall be preferred, &c. &c.

“ descent of a newly-purchased estate to a brother of a mother, or
 “ his representative.—If the grandmother is more worthy than the
 “ mother because related by one male blood, and the mother by
 “ none, the great-grandmother, as is well observed by the Editor
 “ of *Plowden*, ought to be still more worthy, being related by two
 “ male bloods.”

IT is conceived that the observation of *Plowden*'s Editor is not entitled to the commendation thus bestowed upon it; for it tends to confound settled distinctions.—Where a blood is once conveyed to a male stock by a female, she and her representatives may be distinguished by a certain denomination, which cannot be varied, whether the consanguinity took place in the second generation upwards, or in the twentieth: they represent female stocks of the paternal line, and one cannot be more * a female stock than another. Thus the people are distributed into natives, denizens, and aliens. No man of the first denomination can with propriety be called more of a native than another of the same denomination; for the son of a refugee, from the edict of *Nantes*, nay the son of an emigrant who was born yesterday within the King's allegiance, while he continues to live within the King's dominions, is a native subject in contemplation of law; and he who can trace his descent from *Caractacus* is not more so.—But in order to shew by more direct proof the inconsistency of this observation, let us have recourse to the Table of Descents in the Commentaries, which is approved of by both Editors. It will there be seen, that the male stock of the maternal line is *Baker*; from *Susan Bates* two male stocks descend, namely, *Herbert Baker* and *Andrew Baker*; from *Hannah Willis* descends one male stock, namely, *Andrew Baker*: but two male stocks are more than one; therefore, according to the observation, the preference ought to be given to the representatives of *Susan Bates*, or N° 16; whereas by the Table it is given to the representatives of *Hannah Willis*, or N° 15: therefore the Table does not adopt the doctrine of a preference to more male blood, over male blood.

* Hale's Hist. C. L. 244.

THE note proceeds thus ; “ and whatever may be the principle
 “ which operates so powerfully as to carry the estate past the
 “ mother to the grandmother, ought to preserve its consistency,
 “ and to carry it also from the grandmother to the great-grand-
 “ mother.”

AFTER the affront put upon Consistency, in the course of this note, it ought not to surprise us should she be disposed to withdraw her influence, and to inquire by what caprice is reference now made to her decision.—For ourselves, we admit of the appeal, asserting that the supporters of the ancient doctrine do preserve the consistency of their principles throughout ; and that in the system adopted by the Editors of *Plowden* and *Blackstone* consistency is violated.

THE principles which we avow and maintain are thus laid down with scientific accuracy by Sir *Edward Coke* ; “ Descent is, by the
 “ act of law and right of blood, unto the worthiest and next of
 “ blood and kindred of the ancestor.” *Co. Lit.* 237. Thus in a feud of indefinite antiquity, of two claimants, if one be more worthy in blood than the other, the most worthy shall ever succeed ; where they are equal in point of dignity, the next in blood to the person last seized shall succeed. The case of *Clere v. Brooke* was determined by the first of these principles : the claimants were the representatives of the mother of the person last seized, and the representative of the father’s mother ; the inheritance was adjudged to the latter, on the principle of dignity ; those claiming under a female stock of the paternal line being more worthy in blood than any claimant of the maternal line. The point that gave rise to the eight studied *Reasons* assigned by *Blackstone*, to the *Remarks* upon those *Reasons*, and to the laboured notes of the Editors of *Plowden* and *Blackstone*, respectively in support of *Blackstone*’s position, turns upon this question, Whether an inheritance should vest in the representative of the mother of the father of *John Styles*, or in the representative of the mother of his grandfather ? The case of *Clere* and *Brooke* having established the principle already explained, by which
 the

the estate is carried past the mother to the grandmother, we are called upon to preserve its consistency, by carrying the estate past the grandmother to the great-grandmother. But the principle of worthiness of blood, though applicable and decisive between persons of unequal dignity, as in *Clere* and *Brooke*, cannot apply between persons of equal dignity, as the mother of the father, and the mother of the grandfather. We ought not therefore to be convicted of inconsistency for not having recourse to a principle that does not apply; the principle to which we resort in this case is that of proximity, which all the elder writers pronounce to be decisive of the question.—I shall content myself with citing three authorities.

“ AND as to the objection which has been made, *viz.* that if
 “ proximity of blood should not be preferred in descents, it would
 “ create infinite confusion, and would perhaps set up many compe-
 “ titors for one and the same inheritance; to this *Manwoode* Justice
 “ answered, that there never will be any such confusion if the more
 “ worthy in blood is preferred; but if they are equally worthy in
 “ blood, then the nearest shall be preferred; as if the purchaser
 “ dies without issue, &c. &c.; and so the brother or sister of the
 “ purchaser’s grandmother, *viz.* the mother of the purchaser’s fa-
 “ ther, shall be preferred before the brother or sister of the purcha-
 “ ser’s great-grandmother, *viz.* of the mother of the purchaser’s fa-
 “ ther’s father, because they are equally worthy in blood; for such heirs
 “ come from the blood of the female sex, from which the purchaser’s
 “ father issued; and where they are all equally worthy, the next of
 “ blood shall always be preferred as heir.” *Plowden* 448.

To this report of the case *Plowden* subjoins the following note:

“ NOTE.—In the case before put, where the purchaser in fee dies
 “ without issue, and the brother of the grandmother, on the part of
 “ the father, claims the land as heir; and the brother of the great-
 “ grandmother, on the part of the father, also claims the land
 “ as heir; many were of opinion that, because there was no
 “ nearer

“ nearer heir of the male line, the brother of the grandmother
 “ should not be preferred, (as Justice *Manwoode* had said,) but
 “ that the brother of the great grandmother should be adjudged
 “ heir, for his blood is derived to the purchaser by two males,
 “ viz. by his father and grandfather; whereas the blood of the
 “ brother of the grandmother is derived to the purchaser but by
 “ one male, and the grandfather was not of the blood of the brother
 “ of the grandmother, but he was of the blood of the brother
 “ of the great-grandmother, and therefore such blood is more
 “ worthy. And upon this, I put the question again to *Manwoode*,
 “ in the presence of *Harper*, another of the Justices of the Common
 “ Bench, both of whom held clearly, that the brother of the grand-
 “ mother should be heir to the purchaser, and not the brother of
 “ the great-grandmother; because the former is nearer in blood to
 “ the purchaser on the part of his father, which proximity holds
 “ place on the part of females conjoined by marriage to males,
 “ where such blood is once derived by a male to the first purchaser.
 “ And at another day I put the question to *Mounson*, *puisne* Justice of
 “ the same Bench, and he was of the same opinion with the other
 “ Justices, for the same cause. And at another time afterwards, I
 “ put the same question to the Lord *Dyer*, who was of the same
 “ opinion also. So that all the Justices of the Common Bench
 “ unanimously agreed in the said case, that the brother of the pur-
 “ chaser’s grandmother on the part of the father, should be pre-
 “ ferred before the brother of the purchaser’s great-grandmother on
 “ the part of the father.” *Plowd.* 450, 1.

SIR *Matthew Hale* is equally clear and positive upon the question.
 “ Where the son is once seized, and dies without issue, his grand-
 “ mother’s brother is to him heir of the part of his father, and be-
 “ ing nearer than his great-grandmother’s brother, is preferred in the
 “ descent.” *Hist. C. L.* 241.—And “ though it be also true that the
 “ great-grandmother’s blood has passed through *more* males of the
 “ father’s blood, than the blood of the grandmother, or mother of
 “ the father, yet in this case the father’s mother’s sister shall be pre-
 “ ferred before the father’s grandmother’s brother, because they are
 “ all

" all in the female line, and the father's mother's sister is the
" nearest." *Hist. C. L.* 245.

THE last authority is from Lord Chief Baron *Gilbert*.—After stating the case in question he concludes thus. " The blood of the father's
" mother was preferred to the blood of his grandmother, being both
" female bloods, and both coming under the consideration of ancient
" tenants; the nearer tenant's blood was preferred to the more re-
" mote." *Gilb. Tenures* 19.

HAVING thus vindicated ourselves by authorities sufficiently respectable from the charge of inconsistency, we again retort the charge upon the editors of *Plowden* and *Blackstone*, and prove it thus. If the being related to the person last seized by two male bloods, gives the preference over a party who is related but by one male blood; the sister of the great uncle or N° 8 ought to be preferred to the sister of the uncle or N° 7, which is contrary to the preference given in the Table of Descents.

" BUT certainty is of much greater importance than consistency
" or symmetry."

As the Commentaries on the Laws of *England* will probably be the first elementary treatise recommended to the student for many years to come, and perhaps while the present editor directs his care and attention to the work, his edition will be preferred by the rising generation, it is submitted to his judgment, whether it be a fair procedure with regard to the science he professes, to fix upon the minds of students a notion that the theory of the law is unsettled in one of its most important titles. For the encouragement of the young reader, and to relieve him from the apprehension that he may be wandering in a labyrinth of uncertainty, we shall acquaint him with the sentiments of a writer of the last century on this subject, who yields not in point of authority to any writer on *English* jurisprudence, in the present or any other age. Sir *Matthew Hale*, Lord Chief Justice of the Court of King's Bench, in his History of the Common Law of *England*, has treated on the Law of Descents with great copiousness and perspicuity; in discussing questions that
may

may occur in the transversal ascending line, he has put the case since controverted by *Blackstone* in various points of view, and has uniformly decided it contrarily to the preference given in the Table of Descents. After having laid down eight rules on this branch of the subject, he concludes in these words: " And thus the law stands in point of descents or hereditary succession in *England* at this day, and has so stood, and continued, for above 400 years past, as by what has before been said may easily appear." Nearly one hundred and fifty years have elapsed since this paragraph was written; during which time no change has taken place in the general Law of Descents, either by statute, or judicial determination; it is therefore left to the student's calculation, and to the confidence he may place in Sir *Matthew Hale*, to determine whether the Law of Descent is wanting either in stability or antiquity.

" AND if we have no other rule among heirs through females beyond the mother than proximity, what have we to assist and guide us, where there are descendants of a number of female ancestors, or of ancestors through females of equal proximity? For if N^o 10 is not to be preferred to 11, what principle can we find to determine between 10, 12, and 13? They have all an equal claim by proximity; the supporters of proximity will not be so bold as to say that they shall be coparceners, or that they shall run a race, and one shall gain the estate by occupancy."

BEFORE we undertake to answer the questions proposed, it may be useful to make a few observations on that description of persons who are thus pointedly apostrophised under the appellation of " supporters of proximity." Should this edition of the Commentaries fall into the hands of any students in theology, (and it is hoped that some edition of *Blackstone* will at times occupy the attention of every gentleman and every student, of whatever profession, in *England*;) it would be a matter of curiosity, to learn the notions conceived by them of the class of juridical schismatics to which the persons thus described might belong. It is natural to imagine that they would be

deemed a sort of innovators upon established doctrines, such as New-light men, Unitarians, or Muggletonians.—Whereas in truth and in fact, they support no novelty, but do strenuously maintain the doctrines that have been uniformly handed down by every writer of authority from *Britton* to *Blackstone* included. To establish this position a series of authorities shall be cited, that the reader may determine whether the doctrine of proximity be orthodox or heterodox.

Mes en tous cas est cil plus *prochein* heire de droit a quele meer droit de plutot descent. *Britton* 269.

Et a dareyn come defaute eyt trove en la line traversale descendant si feront ceux recevable qui feront trouvé *plus prochein* amountant. *Id.* 269.

Quamvis omnes sic in infinitum ascendendo et descendendo recti sunt hæredes et iusti, tamen non omnes simul vocantur ad successionem quia *propinquior* excludit propinquum, propinquus remotum, remotus remotiorem. *Brañon* 64.

Incipit a primo gradu, a patre vel matre ascendente usque ad avum, a secundo gradu, scilicet ab avo ad proavum. *Id.* 67.

Ex istis omnibus deficientibus ad superiores fiet ascensus, sicut ad fratrem avi vel aviæ vel sororem, tum fratres abavi vel abaviæ. *Fleta.* 375.

Si homme purchase terres in fee-simple, et devy fans issue, chescun qui est son *prochein* cousin collateral del entire sanke de quel plus long degree qui il sort poet inheriter. *Littleton*, sec. 2.

By the old custom of the realm, shall the inheritance descend to the *next* kinsman of the whole blood. *St. German* 20.

In semblable dignity *procheine* de sanke tous dits sera prefere come heire. *Plowden* 450.

For

For lack of uncles and aunts, then cousins in the *nearest* degree of consanguinity. *Lord Bacon's Law Tracts* 128.

It is a maxim of the law that the *next* and worthiest of blood shall ever inherit. *Coke Littleton* 14.

Descent is by act of law and right of blood, unto the worthiest and *next* of blood and kindred to the ancestor. *Id.* 237.

An heir is *next* of worthiest of whole blood. *Finch's Law* 116.

In descents the *next* of blood is preferred before the more remote. *Hale's H. C. L.* 235.

Under the consideration of ancient tenants, the nearer tenant's blood was preferred before the more remote. *Gilb. Ten.* 19.

The collateral heir of the person last seized, must be his *next* collateral kinsman of the whole blood. *2 Blackstone's Com.* 224.

The object of the common law is proximity merely, not indeed an absolute proximity, but a proximity sub modo.

Blackstone's Essay on Coll. Conf. 32.

FROM these authorities we presume it may be fairly concluded that the doctrine of proximity is orthodox; and that every man who professes to expound the law of *England*, will in questions of descent be a supporter of proximity.

To revert to the first question proposed, "If we have no other rule among females beyond the mother than proximity, what have we to assist and guide us, when there are descendants of a number of female ancestors, or of ancestors through females of equal proximity?"

PROTESTING always against the hypothesis in this question contained, it is thus answered—Dignity, or the *jus representationis*.

To

scended from persons equal in point of proximity; but while any issue of either A, B, or C, is living, none of the issue of D, E, F, shall inherit; for the former are more worthy in blood: the rule which decided the case between N° 11 and N° 18. Let us suppose A to have left a grandson, B a son, and C to survive. In this case, C, the nearer in ordinary acceptation to the *propositus*, by two degrees, than the grandson, shall not succeed; but the inheritance shall by act of law, and right of blood, vest in the grandson of A, *jure representationis*; and in defect of him, in the son of B, by the same rule, in preference to C, being respectively branches from the roots A and B; and therefore N° 12 and 13, being respectively branches from the root N° 11, shall, as representing that root, be preferred to N° 10.

THE same doctrine is in fact laid down by *Blackstone*, p. 238, although the reason is not there assigned; for, after having resorted to the issue of *Luke* and *Francis Kempe*, the blood of *Cecilia Kempe* is to be traced *in infinitum*, as every branch thereof will represent the root N° 11.

NOTWITHSTANDING therefore the Editor is pleased to say, "We may easily suppose 15, 31, or any other number of claimants, without any clue whatever to determine the priority of their proximity;" it is manifest from the authorities produced, that the law of England has provided the clue required, by directing that in all questions between collateral branches, the branches shall be traced to their respective roots; that the preference between contending roots shall be determined by the principle of dignity of blood wherever it can apply, and where they are of equal dignity, by the principle of proximity to the person last seized.

SHOULD these pages be honoured by the perusal of any persons, whose attention has not hitherto been directed to questions of this nature, perhaps their surprise may be excited, that the decision of all the variety of claims that can arise from the most extensive

genealogy, should be reducible to two principles so simple, clear, and comprehensive, as those above stated. It might naturally be presumed, if the imputation of uncertainty were deservedly attached to the science of the law, that the wide field of Descents would afford an abundant harvest of such difficulties: but the Writer persuades himself, that when the intelligent Reader shall be apprised of the clear and elegant solution of which all questions in this branch of science are susceptible, he will unite in opinion, that independently of all political relations, it is a pregnant proof of the wisdom of our ancestors, that they were able to contrive an extensive and practicable system upon such a simple theory.

THE remaining part of the note tends to explain, by a scheme subjoined, the doctrine of Descents laid down by the learned Editor; in the course of which we meet with the rule already noticed, that when we can find no heir issuing from the male ancestors, we must have recourse to the females: but in this research *we must begin at the other end*, and pursue a different direction.

WE have already commented on the certainty ascribed to this rule. It remains for us to prove, that this rule is not only inconsistent with *Blackstone's* doctrine, but also with the doctrine of every Writer upon the English Laws of Descent. In support of the latter clause of our position, we have only to refer the Reader to the collection of authorities during six successive ages, cited to prove, that proximity without distinction with regard to male or female stocks, is a principle of the law; whereas, according to the Editor's scheme, we must in the research of female ancestors "begin at the other end." In different words, the Editor adopts a principle of remoteness; but the principle of remoteness is inconsistent with the doctrine of proximity, which is the doctrine of every authority upon the Laws of Descent.

WITH respect to *Blackstone's* doctrine, we repeat, that we can no where find the doctrine of remoteness asserted as a rule, although he has thought proper in one instance to give a preference.

to the more remote of two claimants equal in point of dignity : but that such particular instance, as well as the general principle of remoteness as laid down by the Editor, is inconsistent with *Blackstone's* doctrine, we undertake thus to prove.

By turning to the second volume of the Commentaries, p. 224, where *Blackstone* first begins to treat of collateral succession, it may be observed, that in every page, (except during a digression respecting half-blood,) to the conclusion of the chapter, there will be found a rule or observation contradictory or contrary to the instance supported by himself, and to the doctrine laid down by his Editor. The citations follow.

A SIXTH rule or canon therefore is, that the collateral heir of the person last seized, must be his *next* collateral kinsman of the whole blood. *2 Com. 224.*

ON failure of the issue of the person last seized, the inheritance shall descend to the issue of his *next immediate* ancestor. *Id. 225.*

IN order to ascertain the collateral heir of *John Stiles*, it is necessary to recur to his ancestors in the first degree.—On default of such, we must ascend one step higher to the ancestors in the second degree, then to those in the third and fourth, and so *upwards*, in infinitum. *Id. 226.*

THE rule, then, together with its illustration, amounts to this, that in order to keep the estate of *John Stiles* as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the *nearest couple* of ancestors that have left descendants behind them. *Id. 233.*

THE two grandfathers and grandmothers of *John Stiles* are each in the same degree of propinquity in the third degree, and are *upon the extinction of the two inferior degrees* all equally entitled, &c. *Id. 234.*

WHEN such first purchaſor was not eaſily to be diſcovered, the lawyers not only endeavoured to-inveſtigate him by taking *the next relation* of the whole blood, &c. 2 Com. 235.

the ſide from which they deſcended is forgotten, here the right of inheritance firſt *runs up* all the father's ſide. Id. 236.

SHOULD theſe citations be thought inſufficient to eſtabliſh an in-
conſiſtency between *Blackſtone* and his Editor, recourſe may be had
to another medium. Let the Reader apply the rule laid down by
the Editor, to the Table of Deſcents contained in the Commentaries,
which is projected upon the ſuppoſition that, before the inheritance
veſts in any given number, all the antecedent claimants are extinct.
After the male ſtocks of the maternal line are extinct, there remain
females, *Emma White* and *Eſther Thorpe*. Now, in this caſe, does
Blackſtone begin at the "other end," or N^o 20, or does he not? It
is manifeſt that the other end, or remotest female, is the laſt perſon
to take according to *Blackſtone*; but according to his Editor, ſhe is the
firſt perſon with whom we muſt begin.

AFTER the conſideration ſo freely beſtowed by the Editor on the
ſubject, it is to be preſumed that his opinion is founded on ſome au-
thority: ſhould he continue to reprint the note in queſtion, he is re-
queſted to point out on what authority he ſupports his poſition,
that in tracing the female ſtocks of the paternal line, we are to begin
at the other end.

AND thus we conclude our Remarks on the Inconſiſtency of the
Scheme of Deſcents projected by *Blackſtone's* Editor, with the Doctrines
laid down in the Commentaries, and in every Writer of Authority
upon the Laws of Deſcent.

THE END.

E. A. B. P.
17/2/08